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RAILWAY STRIKES AND THE CONSTITUTION.

Labor as well as capital may be affected with a public interest. To assure proper railroad service restraints may be imposed not merely on those who serve with their property but also on those whose service is personal. This doctrine, briefly recognized by the Supreme Court in remarks of the majority in the opinions sustaining the Adamson Law,¹ appears novel and has been sharply challenged by leaders of labor.² The object of this article is to discuss its constitutional aspects, particularly in application to proposed railway strike legislation. Such legislation has for its purpose the equitable adjustment of labor controversies without

¹Wilson v. New (1917) 37 Sup. Ct. 298. The law provided that beginning January 1, 1917, eight hours should, in contracts for labor and service, be deemed a measure or standard of a day's work for the purpose of reckoning the compensation for services of employees of railroads engaged in the operation of trains, and that pending a report of the commission, provided for in the act to study the operation of the eight hour work day, the compensation of railway employees should not be reduced below the standard day's wage, which in the case of eighty-five per cent of the roads was based on a ten hour day, and that for the necessary time in excess of eight hours such employees should be paid at a rate not less than *pro rata* for the eight hour day, and made a violation of the act a misdemeanor. It did not appear how employees could violate the act except perhaps by refusing to accept for eight hours work what was formerly the pay for ten hours work. While the Chief Justice in his opinion of the majority referred to the act as a "compulsory arbitration" of the dispute, its burdens and restraints bore wholly on the railways. The remarks of the Court justifying the application of the act to the employees may therefore be regarded as *dicta* and the discussion of the point was short and without specific reference to the bearing of the Fifth or Thirteenth Amendments. The Chief Justice said:

"whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them, and, by concert of action, to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest
* * * " (At p. 303).

Mr. Justice McKenna, in his concurring opinion remarked:

"When one enters into interstate commerce, one enters into a service in which the public has an interest, and subjects one's self to its behests." (At p. 308).

Mr. Justice Day, dissenting, was not prepared to "deny to Congress
* * * the right to fix by lawful enactment the wages to be paid to those engaged * * * in the operation of trains carrying passengers and freight." (At p. 308).

²Samuel Gompers, President of American Federation of Labor, 5 to 4 on Slavery, 24 American Federationist, No. 4, p. 290. As to the attitude of labor leaders and organizers, see also Report of the Testimony at the Hearings Beginning January 2, 1917, before the Senate Committee on Interstate Commerce, 129-289; W. S. Carter, President, Brotherhood of Locomotive Firemen and Enginemen, The Objections of Organized Labor to Compulsory Arbitration, Proceedings of the Academy of Political Science in the City of New York, Vol. VII, No. 1, p. 36.

the intolerable public hardship which would result from an actual strike. It is maintained that restraints upon striking, incidental to such a plan, (1) would constitute a proper regulation of interstate commerce, (2) would not establish slavery or involuntary servitude within the meaning of the Thirteenth Amendment, and (3) would not involve a deprivation of the liberty of railway employees "without due process of law".

A word first as to the legislation proposed. For many years there have been provisions in the federal railroad statutes designed to facilitate adjustment of labor controversies without interruption of the service, but they have depended for operation upon voluntary acceptance by the parties of mediation or arbitration.³ Last August when the Railroad Brotherhoods declined to accept arbitration and threatened a country wide railroad strike, the President found himself without power to meet the emergency. Among other measures which he then urged upon Congress was a compulsory investigation law. This law, not yet adopted, would provide for an investigation of any threatening controversy by a board appointed by the President, which should report within

³The first law was that of 1888. 25 Stat. 501. It provided that the President could appoint a committee of three including the Commissioner of Labor, to inquire into any railway labor controversy and the means of adjusting it, reporting to the President and to Congress; for the tendering of the services of such commissions to the parties for mediation, and also for giving to boards of arbitration chosen by the parties certain powers as to procedure. This act was never used.

The Erdman Act of 1898, 30 Stat. 424, superseding the law of 1888, provided for mediation upon application of either party by a commission consisting of the Chairman of the Interstate Commerce Commission and the Commissioner of Labor, and also provided for voluntary arbitration by boards of three, one member to be chosen by each party and a third by those two, or in default of such choice by the commission. It also gave authority to the boards of arbitration as to procedure and provided for an appeal to the courts on questions of law and for court enforcement of awards; provided, however, that no injunction should require any laborer to work without his consent. There were also provisions in effect forbidding striking pending an award or within three months thereafter "without just cause". These restrictive provisions operated, however, only when the employees had first agreed to arbitrate.

The Newlands Act of 1913, 4 U. S. Comp. Stat. (1913) §§ 8666-8676, now in force, reenacted some provisions of the Erdman Law but provided for two federal mediators giving their whole time to the work; mediation boards to consist of one such mediator and not more than two other such officials designated by the President. Provision was made for six-member-boards of arbitration as well as three-member-boards. The provisions for court enforcement of awards and the restrictions upon striking were omitted.

As to the operation of these laws, see the statement of Hon. William L. Chambers, Commissioner of the U. S. Board of Mediation and Conciliation, in Report of the Testimony at the Hearings Beginning January 2, 1917, before the Senate Committee on Interstate Commerce, 75, 84, 85.

three months the facts relating to it, together with recommendations for settlement according to the merits and substantial justice of the case; and that pending the investigation, a publication of the report, and until thirty days thereafter, it should be unlawful for employees to declare or practice a strike or for the employer to cause a lockout. A strike was defined as a cessation of work by a body of employees acting in combination as a means of compelling the employer to accept terms of employment.⁴

The President's recommendation was the first weighty suggestion of any federal limitation of the right to strike which should be operative otherwise than by agreement of the employees. No such restriction appears to be in force in any state except Colorado, where an investigation law applying to all industries has been in force since 1915.⁵ The investigation plan is based upon the Industrial Disputes Investigation Act of Canada adopted in 1907 for railways, other public service companies and mines, and recently extended to cover other industries.⁶ Informed public opinion is the force relied upon for the settlement of controversies under this plan, and the means of securing it is publication of the established facts. This is a familiar method for the exercise of regulatory authority.⁷

A plan of compulsory arbitration would involve the total

⁴See address of the President delivered at the joint session of the two Houses of Congress, December 5, 1916, 54 Congressional Record, No. 2, pp. 32-33, summarizing his recommendations, and the investigation bill drawn pursuant to such recommendations. Report of the Testimony at the Hearings Beginning January 2, 1917, before the Senate Committee on Interstate Commerce, 5-10.

⁵Sess. Laws Colo. 1915, c. 180, §§ 29, 30.

⁶Stat. Can. 1907, 6-7 Ed. VII c. 20. This act superseded an earlier Railway Labour Disputes Act of 1903, 3 Ed. VII c. 55, which contained no restraint upon striking. See also Canadian Orders in Council etc., 1916, Order of March 23, 1916.

As to the operation of the Canadian plan, a leading authority is Sir George Askwith, who made an elaborate report to the British Board of Trade in 1912. His conclusion was that the "pith of the Act lies in permitting parties and the public to obtain full knowledge of the real cause of the dispute, and in causing suggestions to be made as impartially as possible on the basis of such knowledge for dealing with existing difficulties", and that "such an Act while not insuring complete absence of strikes and lockouts would be valuable, in my opinion, alike to the country and to the employers and the employed."

See Carl H. Mote, *Industrial Arbitration*, 181, 184; W. L. Chambers, *Report of the Testimony at the Hearings Beginning January 2, 1917, before the Senate Committee on Interstate Commerce*, 83.

⁷Freund, *Police Power*, § 35. "Prevention through publicity. * * * Measures securing publicity are especially valuable and may often be relied upon to bring about the desired standard of private action without prescribing that standard in positive terms".

prohibition of striking, while the investigation plan restrains striking for a brief period only. Establishment of compulsory arbitration in this country has not been seriously urged. A bill was introduced by Senator Underwood to empower the Interstate Commerce Commission to fix hours of labor and wages of employees of interstate carriers; it contained no provision against strike.⁸

Drafting employees for compulsory service is entirely different from prohibiting them to strike. Compulsory service has been suggested only for periods of actual war, insurrection or invasion. The support of a statute providing for such drafting would rest upon grounds applicable to conscription of citizens for military service rather than upon principles of law relating to public service companies and the regulation of interstate commerce.

I. THE AUTHORITY OF CONGRESS.

Any effective strike legislation for railways must of course be national, and the Adamson Law decision definitely establishes the power of Congress to deal with this subject.

This result was not a foregone conclusion. The plenary character of the authority conferred on Congress by the commerce clause had been recognized from the earliest decisions.⁹ A vast body of regulations governing railways as the chief instrumentalities of such commerce, peculiarly affected with a public interest, had been sustained.¹⁰ Nevertheless the Supreme Court had apparently taken the view that the relations between railway employers and employees, not directly relating to efficiency or safety, were private matters having no bearing upon interstate commerce and lying beyond the scope of congressional regulation. This doctrine was laid down in *Adair v. United States*,¹¹ in which

⁸See Report of the Testimony at the Hearings Beginning January 2, 1917, before Senate Committee on Interstate Commerce, 12.

⁹*Gibbons v. Ogden* (1824) 22 U. S. 1; *M'Culloch v. Maryland* (1819) 17 U. S. 316.

¹⁰See cases cited in opinion of Mr. Chief Justice White in *Wilson v. New*, *supra*, footnote 1 (especially for late applications); *Atlantic Coast Line v. Riverside Mills* (1911) 219 U. S. 186, 31 Sup. Ct. 164; *B. & O. R. R. v. Int. Com. Comm.* (1911) 221 U. S. 612, 31 Sup. Ct. 621 (hours of service); *Second Employers' Liability Cases* (1912) 223 U. S. 1, 32 Sup. Ct. 169.

¹¹(1908) 208 U. S. 161, 28 Sup. Ct. 277. Mr. Justice Harlan delivering the majority opinion said:

"Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of

a majority of the Court held that a provision of the Erdman Law prohibiting a railway company from discharging an employee for belonging to a union was unconstitutional because it had no real or substantial relation to interstate commerce and hence purported to regulate a matter which should be left for uncontrolled private settlement. Such a view persisted in the minds of the minority judges who passed upon the Adamson Law.¹² They maintained that as no railroad company was obliged to employ any particular individual and as no individual was under any duty to hire out to work for a railroad company, the fixing of the terms of employment was a matter of private bargaining between the parties in which each had a constitutional right to exact such terms as he deemed proper.

The majority of the judges, sustaining the Adamson Law, viewed the matter of fixing the terms of employment upon railways in a different light. They had come to see that failure of the parties to reach an agreement upon terms may mean a strike, and that a strike inevitably involves a stoppage of the means of carrying on interstate commerce. As to whether under present

Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated. But what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce?" (At p. 178).

Mr. Justice McKenna in his noteworthy dissenting opinion said:

"A provision of law which will prevent or tend to prevent the stoppage of every wheel in every car of an entire railroad system certainly has as direct influence on interstate commerce as the way in which one car may be coupled another, or the rule of liability for personal injuries to an employee." (At p. 189).

Of the prevention of railway strikes he remarked that "no worthier purpose can engage legislative attention". (At p. 184).

Mr. Justice Holmes also thought that it could not be doubted that to prevent strikes in so far as possible, fostering a scheme of arbitration might be deemed by Congress an important part of policy.

¹²This view was vigorously expressed by Mr. Justice Pitney in his able dissenting opinion, with which Mr. Justice Van Devanter concurred. He said:

"I am convinced * * * that the act cannot be sustained as a regulation of commerce, because it has no such object, operation, or effect. * * * The suggestion that it was passed to prevent a threatened strike, and in this sense to remove an obstruction from the path of commerce, while true in fact, is immaterial in law. * * * This, in my view, is a regulation not of commerce, but of the internal affairs of the commerce carriers * * *." (At p. 313).

conditions a measure aimed to prevent strikes constitutes a regulation of commerce, the majority inquired, at page 303:

"Again, what purpose would be subserved by all the regulations established to secure the enjoyment by the public of an efficient and reasonable service if there was no power in government to prevent all service from being destroyed?"

To the minds of the majority, if the prevention of the destruction of interstate commerce involves in certain cases the regulation of the terms of employment of those who in fact carry on the service, then the fixing of those terms had ceased in part to be a private matter and has become a public matter. Whatever views may be entertained as to the soundness of the Adamson Law decision on other points, this central position of the majority of the judges seems unshakeable. The principal reason for any regulation of interstate commerce is to insure its unobstructed flow. So far as the public is concerned it makes no difference in what manner an interference may be effected. If prevention or interruption caused by direct obstruction and violence is part of the regulation of commerce, prevention or interruption caused by strikes falls equally within the commerce clause.

As to the extent to which Congress may go in imposing regulations to prevent strikes, it is important to bear in mind that under the commerce clause Congress may exercise that vast undefined authority referred to as "the police power".¹³ This phrase was not used in describing the authority delegated to Congress

¹³"Some of the recent instances of the exercise of federal power indicate the existence of a power over interstate and foreign transactions which is similar to or parallel with that which is exerted by the States with respect to their domestic or local affairs, and which is understood as the State police power". Calvert, *Regulation of Commerce*, 52, 116. "In view of all this legislation, it is impossible to deny that the federal government exercises a considerable police power of its own. This police power rests chiefly upon the constitutional power to regulate commerce among the states and with the foreign nations." Freund, *Police Power*, §§ 64-66, 68, 84. Cooke, *Commerce Clause of Federal Constitution*, 68; Paul Fuller, *Is There a Federal Police Power?*, 4 *Columbia Law Rev.* 563; Cooley, *Constitutional Limitations*, (7th ed.) 856. "In this connection it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution. What provision in that instrument can be regarded as limiting the exercise of the power granted?" Mr. Justice Harlan, delivering the opinion of the majority in the *Lottery Case* (1903) 188 U. S. 321, 356, 23 Sup. Ct. 321. *United States v. D. & H. Co.* (1909) 213 U. S. 366, 29 Sup. Ct. 527 (sustaining the commodity clause); *Hoke v. United States* (1913) 227 U. S. 308, 33 Sup. Ct. 281 (sustaining the White Slave Act); *Clark Distilling Co. v. Western Maryland Ry.* (1917) 242 U. S. 311, 37 Sup. Ct. 180 (sustaining *The Webb-Kenyon Act*).

by the states under the Constitution, and it has been questioned even recently¹⁴ whether Congress has such power. But it is now recognized that this phrase, never defined, refers not to the subject as to which authority may be exercised, but rather to the objects for which power may be used and the extent to which it may be employed. In dealing with interstate and foreign commerce, a subject confided to Congress without limitation or reservation, Congress may use its power for any purposes to which governmental authority may properly be addressed, and to the full extent to which a state may in its proper sphere employ its inherent power.

II. INVOLUNTARY SERVITUDE.

Since the adoption of the Thirteenth Amendment it has of course been true that "no regulation of commerce established by Congress can stand if its necessary operation be either to establish slavery, or to create a condition of involuntary servitude."¹⁵ A prohibition of strikes by railway employees, imposed, not to tie the employee to his work, but to prevent direct harm to the public through the power of a great combination to cause a stoppage of necessary public service, would not, however, involve slavery or involuntary servitude within the meaning of this Amendment.

The Amendment has been broadly referred to as "a charter of universal freedom for all persons of whatever race, color or estate." Yet what it assures is not freedom from any restraints—a matter covered by the Fifth and Fourteenth Amendments—but merely from such restraints as operate to create a condition of slavery or of servitude akin to slavery.¹⁶ This condition must be

¹⁴See opinion of minority judges in *Lottery Case*, *supra*, footnote 13.

¹⁵Mr. Justice Harlan, dissenting, in *Robertson v. Baldwin* (1897) 165 U. S. 275, 293, 17 Sup. Ct. 326.

¹⁶The text of the Thirteenth Amendment is as follows:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation."

In the *Slaughter-House Cases* (1872) 83 U. S. 36, in which the Amendment was first construed, Mr. Justice Field, dissenting, took the view that complete abolition of servitude involved assuring the right to carry on the ordinary avocations of life free from any restraints other than general restraints; but this view as to the scope of the Amendment was rejected by the majority, who held that its object was to effect the abolition of

characterized by the holding of one man against his will in the private service of another.

Compelled performance of a contract for personal services which the worker no longer desires to render, is involuntary servitude in spite of the worker's original consent.¹⁷ Courts have not attempted to compel specific performance of personal service contracts, not originally because it would be contrary to the Amendment, but because the attempt would be futile.¹⁸ Since the adoption of the Amendment, as before, they have held the worker liable in damages for breach of such a contract. This "disagreeable con-

slavery as it had previously been known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade when they amounted to slavery or involuntary servitude. In the Civil Rights Cases (1883) 109 U. S. 3, 3 Sup. Ct. 18, it was held that the Amendment did not authorize Congress to require equal accommodations for all persons at inns, and at other public places, and the view that the Amendment covered all civil rights was again rejected. Mr. Justice Harlan, dissenting, argued merely that the Amendment abolished distinctions in rights founded on distinctions in race, in that it gave Congress power to define and regulate all civil rights.

In *Plessy v. Ferguson* (1896) 163 U. S. 537, 16 Sup. Ct. 1138, a state statute requiring equal but separate provisions for the two races in public places was sustained against attack under the Amendment. The court said:

"That it does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, * * * is too clear for argument. Slavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services". (At p. 542).

In *Hodges v. United States* (1906) 203 U. S. 1, 27 Sup. Ct. 6, the Court held unwarranted a United States statute imposing penalties for conspiring to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, remarking:

"But every wrong done to an individual by another, * * * operates *pro tanto* to abridge some of the freedom to which the individual is entitled. A freeman has a right to be protected in his person from an assault and battery. He is entitled to hold his property safe from trespass or appropriation, but no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery". (At pp. 17-18).

See *Butler v. Perry* (1916) 240 U. S. 328, 36 Sup. Ct. 258.

¹⁷"Such a performance, if enforced by law, would produce a state of servitude as degrading and demoralizing in its consequences, as a state of absolute slavery * * *." Case of *Mary Clark* (Ind. 1821) 1 Blackf. 122, 124-125. *Matter of Turner* (C. C. 1867) 1 Abbott's U. S. Rep. 84; *Bailey v. Alabama* (1911) 219 U. S. 219, 242, 31 Sup. Ct. 145.

¹⁸*Fry, Specific Performance*, (3rd Am. ed.) 43.

sequence" of failure to carry out such a contract is not considered sufficiently serious to operate as compulsion of performance.¹⁹

Any system under which the worker is required to continue to work after he wishes to stop is, however, under the ban of the Amendment. The peonage system practiced in some of the southern states, under which the laborer was compelled to work out a debt to his employer, was prohibited by federal statutes, and these statutes were held to constitute a valid exercise of power to enforce the Amendment.²⁰ Certain of the southern states desiring to give effect to this system, enacted statutes providing in effect that any worker might be fined or imprisoned who, after receiving an advance from an employer in reliance on his agreement to perform work, should quit his work without repaying the advance. Making criminal the breach of contract to render services to another was held by the Supreme Court to amount to compulsion of the worker to perform the service, and hence to violate the federal anti-peonage statutes and the Amendment.²¹ These peonage cases

¹⁹See *Clyatt v. United States* (1905) 197 U. S. 207, 25 Sup. Ct. 429; also remarks of Mr. Justice Holmes in dissenting opinion in *Bailey v. Alabama*, *supra*, footnote 17, at p. 245 *et seq.*

²⁰*Clyatt v. United States*, *supra*, footnote 19, at p. 215. Peonage was there referred to as "a status or condition of compulsory service, based upon the indebtedness of the peon to the master" under which he is obliged to serve unless or until the debt is paid. *United States v. Reynolds* (1914) 235 U. S. 133, 35 Sup. Ct. 86.

²¹*Franklin v. South Carolina* (1910) 218 U. S. 161, 30 Sup. Ct. 640. In *Bailey v. Alabama*, *supra*, footnote 17, the Alabama statute before the Court provided that any person who with intent to defraud his employer entered into a contract for the performance of any act or service and thereby obtained money, and with like intent refused without refunding the money or property to perform such service, should be liable to a fine and to a jail sentence in default of payment, and that refusal of any person entering into such contract to perform the service contracted for was *prima facie* evidence of the intent to defraud. The Court held that this statute was in violation of the federal anti-peonage statutes and of the Thirteenth Amendment. The Court said:

"The State may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt. * * * 'In contemplation of law the compulsion of such service by the fear of punishment under a statute is more powerful than any guard which the employee could station'". (At p. 244).

Mr. Justice Holmes, with Mr. Justice Lurton concurring, dissented, maintaining that it is not contrary to the Thirteenth Amendment to make refusal to labor according to contract a crime, remarking:

"Peonage is service to a private master at which a man is kept by bodily compulsion against his will. But the creation of the ordinary legal motives for right conduct does not produce it. * * * the power of the States to make breach

are relied upon in the argument against the plan for industrial peace.

The prohibition of striking is, however, by no means the same as the punishing of quitting. What would be contrary to such a statute would not be leaving work, but getting others to leave. The statutory offense would be combining with others, not to assure the right to throw up employment, but to use that right for the purpose of getting better terms of continued employment. The offense would be committed without quitting and could not be committed by mere quitting. Taking away the right to combine is clearly a limitation of civil liberty, but it does not involve legal compulsion upon the individual to remain at his task. There is nothing in the peonage decisions against such a limitation; they dealt wholly with the punishing of quitting, not with the punishing of menacing combinations. If after such a statute were passed an individual were to stay at work when he might otherwise have left, he would do so not because the statute commands him to or punishes him if he does not, but because he would prefer his job if he could not get a better one. His complaint would be that the state had taken away a weapon for his advancement and substituted another, not that it had required him to work.

Assuming, however, that the statute would perhaps operate to make railway employees continue work which they might otherwise wish to abandon and in that sense to compel personal service, it becomes important to consider the nature of the service. In the peonage cases the service in question was to private employers only. Here the service is in a *quasi*-public business. Does that make a difference?

In terms, the Thirteenth Amendment prohibits all compulsory service except any arrangement for crime. Nevertheless it is recognized that this sweeping language is subject to exceptions; it is adopted not to lessen the powers of government as they had always existed, but to prohibit slavery or bondage. The first exception,

of contract a crime is not done away with by the abolition of slavery." (At pp. 246, 247).

It is noteworthy that in *Adair v. United States*, *supra*, footnote 11, the Court remarked:

"And it may be—but upon that point we express no opinion—that in the case of a labor contract between an employer engaged in interstate commerce and his employee, Congress could make it a crime for either party without sufficient or just excuse or notice to disregard the terms of such contract or to refuse to perform it." (At p. 175).

established by the decision of *Robertson v. Baldwin*,²² was that of seamen enlisted on vessels engaged in foreign commerce. The federal statute providing for the arrest of deserting seamen and their return to the master of their vessel was sustained, the Court relying principally on the ground that such rights had always been exerted with reference to seamen on account of the peculiar character and necessities of the business. Mr. Justice Harlan in his vigorous dissent himself asserted that the Amendment in spite of its broad terms was not to be taken as including service rendered directly to the state, as in the army or navy. This exception, while not questioned, has not yet been established by actual decision. In the recent case of *Butler v. Perry*²³ there is express recognition of the implied exception of service of a clearly public character. The decision was that a state may require able-bodied men to perform actual labor upon public highways, and the Supreme Court said broadly, at page 332:

"This Amendment was adopted with reference to conditions existing since the foundation of our Government, and the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results. It introduced no novel doctrine with respect to services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers."

The application of the principle of *Butler v. Perry* to railway employees seems warranted by present day conditions. Such employees were rightly referred to by the Chief Justice as engaged in "public service".²⁴ It would be difficult to argue today that work on railways is in its essence less public than work on highways. It is true that they are not working for the state but for a private employer. Yet the business period of that employer is of a public character. It is academic to assume that the business is carried on by the employer alone; he is powerless to conduct it without employees to perform the physical labor. Employees essential to

²²*Supra*, footnote 15.

²³*Supra*, footnote 16.

²⁴In an oral interpolation made in delivering the opinion of the majority in open court, Mr. Chief Justice White is reported as having remarked as to the right of railway employees to strike—"that right is necessarily surrendered when the men are engaged in *public service*".

the service are in fact as truly engaged in service of a public character as the company.

Even though railroad work may properly be regarded as public work and hence as not within the scope of the Thirteenth Amendment, it does not follow that individuals could be compelled to serve at it for any lengthy periods. No such requirement is involved in the proposed legislation. It is clear that if service to the public can be compelled at all, it can be compelled at least to the point necessary to avoid the quitting, at the same time, of all engaged in the service, leaving the public helpless. Such compulsion would extend only to the avoidance of disastrous emergency, and would not involve the individual in service for any set or unreasonable period.

There are then two answers to the objections to strike prohibition based upon the Thirteenth Amendment: first, that the taking away of the right to combine to quit does not compel the performance of personal labor, which alone would constitute bondage within its meaning; and second, that the compulsion of service of the character of railroad service, at least to the extent necessary to protect the public from disastrous emergency, is not prohibited by it.²⁵

III. STRIKES AT COMMON LAW.

Is there not a lawful right to strike? Is not any attempt to limit such right a mere reversion to eighteenth century severities of English law?

In England, Parliament attempted by early statutes to impose on able-bodied workers of no independent means a positive duty to work for any one who wished to employ them. Parliament also undertook over a long period, beginning in 1349, to regulate wages and hours by statute. The statutes were sometimes general and sometimes directed against particular trades, and "conspiracies or agreements among artificers, workmen or laborers not to work except at certain prices" were frequently prohibited as part of the statutory plan. The case of *Rex v. Journeymen-Tailors of Cambridge*,²⁶ decided in 1721, has been cited for the proposition that such a combination was indictable at common law. It is not clear,

²⁵The above discussion has been abbreviated because of the effective and detailed presentation of the points involved by Thomas I. Parkinson, *Constitutional Aspects of Compulsory Arbitration*, Proceedings of the Academy of Political Science in the City of New York, Vol. VII, No. 1, p. 44.

²⁶8 Mod. 10.

however, whether this doctrine was not in large part the result of statute. By the end of the first quarter of the nineteenth century the progress of doctrines of *laissez-faire* and agitation for greater freedom for working men to better their hard condition resulted in the passage of statutes providing that combinations of workers to obtain advances should not be indictable, and in time trade unions and strikes were sanctioned.²⁷

In this country early legislative ideas were formulated on conceptions of the fullest individual freedom, and employers and employees were left to fix their relations by private contract. In spite of a few early decisions, all but one by lower tribunals, courts, legislatures and the public recognized unions and strikes as lawful.²⁸ It became established that workers are not liable to their employer for damages caused to him by a strike, their quitting not being in violation of any contract. Some courts took the view that there is in such cases no legal wrong, and others, that the wrong is justified by the pursuit by employees of legitimate interests conflicting with those of their employer. Yet in almost all states it has been held that if third persons not parties to the industrial conflict are injured by a strike or by a boycott, the workers are liable to them for damages. If the damage threatens to be irreparable the strike or boycott may be restrained. This is not a revival of the English conspiracy doctrine as has been suggested,²⁹ but a mere application of the fundamental though indefinite rule of law that rights must not be so exercised as to cause damage to others.

Strikes in private industry involve no legal damage to the public. Hardship and economic waste they do cause, but the public is not considered to have any legal interest in the continu-

²⁷As to the development of the English law in regard to labor unions and strikes, see Francis E. Baker, *Respective Rights of Capital and Labor in Strikes*, 5 Illinois Law Rev. 453; Commons & Andrews, *Principles of Labor Legislation*, 91-95; Sidney and Beatrice Webb, *History of Trade Unionism*; Freund, *Police Power*, §§ 325-335.

²⁸See William Draper Lewis, *Modern American Cases Arising Out of Trade and Labor Disputes*, 44 Am. Law Reg. [N. S.] 465; Professor Jeremiah Smith, *Crucial Issues in Labor Litigation*, 20 Harvard Law Rev. 253; Professor E. W. Huffcut, *Interference with Contracts and Business in New York*, 18 Harvard Law Rev. 423; G. G. Groat, *Introduction to the Study of Organized Labor in America*; W. A. Martin, *Modern Law of Labor Unions*, §§ 26-31; C. H. Mote, *Industrial Arbitration*; see also books referred to in footnote 27, *supra*.

²⁹This is suggested in Commons & Andrews, *Principles of Labor Legislation*, at pp. 98, 99; *cf.* Aikens v. Wisconsin (1904) 195 U. S. 194, 25 Sup. Ct. 3, statement of Mr. Justice Holmes; also Loewe v. Lawlor (1908) 208 U. S. 274, 28 Sup. Ct. 301.

ance of a particular industrial unit. A strike on a railway, or other *quasi*-public enterprise, does cause actual damage to the public. There is a recognized interest of the public in the continuance of the enterprise and the causing of a stoppage defeats that interest.

Nevertheless the courts have so far held that a strike against a railroad employer is lawful when it would be lawful if directed against an ordinary private employer. As in the case of a private employer, the causing of employees to leave by unlawful means³⁰ or the promotion of a strike not for the purpose of advancing the interests of the employees as against their employer but of bringing pressure to bear upon the concern with which the employer is in business relations,³¹ is unlawful and will be restrained. An individual who remains at his post upon the railway must carry on his work in such a way as not to involve the company in any violation of its public duties.³² Even when a railroad is being operated by a court through a receiver, its employees have the same right as against any employer to conduct a peaceful strike for the purpose of obtaining better terms of employment. In the leading case of *Arthur v. Oakes*,³³ accepted as establishing much of the law as to railway strikes, the argument that such a strike was unlawful because of the resulting damage to the public was expressly rejected.

While the right of railway employees to enforce their demands upon their employers by strikes has thus been allowed to prevail

³⁰*In re Doolittle* (C. C. 1885) 23 Fed. 544; *United States v. Kane* (C. C. 1885) 23 Fed. 748; *In re Charge to Grand Jury* (C. C. 1894) 82 Fed. 828, 834, 841; *In re Debs* (1895) 158 U. S. 564, 15 Sup. Ct. 900.

³¹*Thomas v. Cincinnati etc. Ry.* (C. C. 1894) 62 Fed. 803; *Toledo etc. Ry. v. Pennsylvania Co.* (C. C. 1893) 54 Fed. 730.

³²*Toledo etc. Ry. v. Pennsylvania Co.*, *supra*, footnote 31; *Toledo etc. Ry. v. Pennsylvania Co.* (C. C. 1893) 54 Fed. 746; *In re Lennon* (1897) 166 U. S. 548, 17 Sup. Ct. 658; *Southern California R. R. v. Rutherford* (C. C. 1894) 62 Fed. 796.

³³(C. C. A. 1894) 63 Fed. 310. Here the Circuit Court had entered a decree restraining employees of a railroad being operated by a receiver from "combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody or embarrassing the operation of said railroad". The Circuit Court of Appeals held that part of the injunction could not be sustained; that it would be an invasion of the natural liberty of the employees to compel them to work for or remain in the service of the company, and that the principles under which strikes in private industries are justified are in the absence of legislation applicable in the case of railroads also. In this case and also in the *Thomas* case the road was in the hands of a receiver. On this point see also: *Elliott, Railroads*, (2nd ed.) § 575, *Marvin, Labor Unions*, § 32.

over the right of the public to railway service, it by no means follows that the legislature must allow this doctrine to stand. In *Arthur v. Oakes* the result was expressly recognized to be reached "in the absence of legislation to the contrary". The present right of railway employees to strike springs from the application of legal doctrines, but it is well recognized that "a person has no property, no vested interest, in any rule of the common law."³⁴ This principle has recently had abundant application. It is the business of the legislature to change the law so as to make it the adequate instrument for the protection of the public under conditions as they have developed.³⁵ There would seem to be nothing inconsistent with the present day legal theories in statutory recognition of the interest of the public as a third party affected by railway strikes, sustaining through them legal damage, the avoidance of which may be made the basis for restriction of practices now permitted.³⁶

IV. LIBERTY AND DUE PROCESS OF LAW.

But is not the right to strike protected by the Constitution? The Fifth and Fourteenth Amendments indeed protect from deprivation, without due process of law, of any civil right, includ-

³⁴*Munn v. Illinois* (1876) 94 U. S. 113, 134.

³⁵See *Bertholf v. O'Reilly* (1878) 74 N. Y. 509; *Western Indemnity Company v. Pillsbury* (1915) 170 Cal. 686, 191 Pac. 398.

³⁶Professor Freund maintains that strikes might be generally prohibited:

"The essence of the strike is not the quitting of the employment, which, where the employed is not under contract to serve for a fixed time, or to complete a certain job, must be his constitutional right, but the agreement or combination to quit simultaneously for the purpose of obtaining an ulterior object. It is well recognized that an act, lawful if done by one, may become unlawful if done by many, in pursuance of a preconceived plan jointly or through an organization. * * * Whether the joint act is different in its nature from the individual act, and whether, if so, it should be treated as unlawful must depend upon circumstances, and may be determined by considerations of policy within the control of the legislature. * * * Conceding that the right to agree to quit work, and to carry out that agreement by concerted action is not an absolute constitutional right, its prohibition might be defended under the principles of the police power on the ground that the strike, even if intrinsically free from acts of illegality, yet has a natural and almost inevitable tendency to lead to acts of coercion if not to acts of violence." Freund, *Police Power*, §§ 335, 336; see all his discussion, §§ 325-336.

For a discussion of the constitutionality of changing established rules of the common law, see the present writer, *A Compensation Plan for Railway Accident Claims*, 29 *Harvard Law Rev.* 705.

ing undoubtedly the right to strike.³⁷ Yet these guaranties were not intended to destroy power to govern. The legal establishment of any rule of conduct involves limitation of individual freedom. It is thoroughly familiar that only deprivations of rights which are arbitrary, wanton or unnecessary for the public welfare are "without due process of law". Whether a particular limitation is necessary is a question for the legislature, and its decision is to be set aside only if clearly unwarranted. The Supreme Court is today trying to determine any such question,

³⁷The text of the Fifth Amendment is as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"Liberty" as used in this Amendment may be taken to have the same force as "liberty" used in the Fourteenth Amendment, which limits state action. *McGehee, Due Process of Law*, 138-142. *French v. Barber Asphalt Paving Co.* (1901) 181 U. S. 324, 21 Sup. Ct. 625; *Allgeyer v. Louisiana* (1897) 165 U. S. 578, at p. 589, 17 Sup. Ct. 427:—

"The liberty mentioned in that amendment" (the fourteenth) "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

The right of the worker to combine and to act in furtherance of combination has been described as fundamental. *Caldwell, J.*, in a dissenting opinion in *Hopkins v. Oxley Stave Co.* (8 C. C. A. 1897) 83 Fed. 912, at p. 929, said:

"In this country the right of wage earners and others to associate together and act collectively is not a boon granted by the government. It is not derived from the Constitution, statutes or judicial decisions. It antedates the constitution. It is a natural and inherent right. * * * This right of men to combine together for lawful purposes necessarily carries with it the right of combined action."

Without conceding that this right stands on any other basis than any other civil right, it would seem clear that all are protected and protected in the same way by the constitutional guaranties of liberty.

not according to *a priori* conceptions of liberty, but according to the actual social facts and necessities.³⁸

In passing on the Adamson Law the majority of the judges decided that the imposing of special burdens upon railway companies, not in their judgment shown to be confiscatory, was justified by the necessity of preventing the vast public hardship caused by a railroad strike. Strikes cannot always or wholly be prevented by the convenient device of compelling the railroads to accede, wholly or substantially, to demands of their employees. The Court felt it necessary to make it clear that its doctrine applied to both parties to these controversies, and stated that, to prevent strikes, the freedom of the employees also might be limited. Consideration will show that the justification of such restraints is in harmony with other decisions of the Court accepted as both sound and enlightened.

The proposed restriction of the right to strike relates to methods to be pursued in gaining a livelihood through a lawful calling. It is well recognized that the practice of various special callings may be subjected to regulation in the public interest. Familiar instances are those of medicine³⁹ in its various branches, the law,⁴⁰ banking,⁴¹ and insurance.⁴² Justification of the limitations imposed in these instances may be chiefly on the ground that special confidence is reposed in the followers of these callings; the state may take steps to see that such confidence is not abused. But such confidence is today reposed in a body of railway employees. Are those who are responsible for life, for the distribution of food, for the movement of commerce by which industrial life is maintained, less trusted than those who look after the health of individuals or who insure their property? If conditions may be imposed as to entering upon a calling of this nature,⁴³ may not conditions be imposed as to leaving it? If the railway employee asserts that he has an unqualified right to quit work, it may be answered that in view of the nature of his calling he has no

³⁸See the scholarly and suggestive article of Professor Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 *Harvard Law Rev.* 353.

³⁹*Dent v. West Virginia* (1889) 129 U. S. 114, 9 Sup. Ct. 231; *Hawker v. New York* (1898) 170 U. S. 189, 18 Sup. Ct. 573.

⁴⁰*Frisbie v. United States* (1895) 157 U. S. 160, 15 Sup. Ct. 586.

⁴¹*Noble State Bank v. Haskell* (1911) 219 U. S. 104, 31 Sup. Ct. 186.

⁴²*German Alliance Insurance Co. v. Kansas* (1914) 233 U. S. 389, 34 Sup. Ct. 612.

⁴³*Nashville etc. Ry. v. Alabama* (1888) 128 U. S. 96, 9 Sup. Ct. 28.

unqualified right to begin work.⁴⁴ If he chooses to enter upon this responsible employment, analogy suggests that he may be required to agree not to leave it under circumstances which will cause the greatest public hardship.

The view that all terms of the relations between employers and employees must be regulated by contract between them is giving away before recognition of the social interest in such terms. Formerly, it is true, statutory regulation of such relations was held to be justified only if the employees were of a class needing special protection, as women,⁴⁵ or in an occupation that was hazardous, as mining.⁴⁶ But the state, which has suffered in many ways from maladjustments in industry has gone farther and farther, with the sanction of the Court, in imposing standards. Factory laws, safety appliance provisions, laws regulating methods of pay, were a beginning.⁴⁷ The Court has now so far abandoned its original position that it has sustained a statute fixing maximum hours of labor of adult male workers.⁴⁸ It has even refused to set aside a state statute providing for the fixing of minimum wages—for women workers it is true—thus acquiescing in an invasion of the very citadel of private bargaining.⁴⁹ It is true that the Supreme Court like the state courts, has stood staunchly against any restriction on employers as to stipulating for or against

⁴⁴*McAuliffe v. New Bedford* (1892) 155 Mass. 216, 29 N. E. 517. In this case a former police officer sought to have reviewed an order of the board of aldermen dismissing him from service on account of political activity in violation of a rule of the board. Holmes, J., remarked:

"The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered to him." (At p. 220).

⁴⁵*See Lochner v. New York* (1905) 198 U. S. 45, 25 Sup. Ct. 539, overruling state statute describing a maximum of ten hours work in bakeries; *Muller v. Oregon* (1908) 208 U. S. 412, 28 Sup. Ct. 324.

⁴⁶*Holden v. Hardy* (1898) 169 U. S. 366, 18 Sup. Ct. 383.

⁴⁷*Knoxville Iron Co. v. Harbison* (1901) 183 U. S. 13, 22 Sup. Ct. 1; *Erie R. R. v. Williams* (1914) 233 U. S. 685, 34 Sup. Ct. 761.

⁴⁸*Bunting v. Oregon* (U. S. Sup. Ct., Oct. Term, 1916, No. 38, decided April 9, 1917). This like a number of decisions above referred to, including that on the Adamson Law, was by a closely divided court. The constitutional law of the United States has in no small degree been moulded by such decisions, from *Munn v. Illinois*, *supra*, footnote 34, to the most recent cases.

⁴⁹*Stettler v. O'Hara* (Oregon Minimum Wage Cases) not yet reported; decided without opinion.

union membership of employees,⁵⁰ but the social necessity for such restrictions has not been demonstrated to the Court in any such way as has, for example, the necessity for the regulation of hours or of minimum pay of women. All the statutes indicated involve limitations upon the rights of workers as well as upon the rights of employers, yet the decisions sustaining those deprivations of liberty as necessary for the public welfare have been regarded by workers as of the most progressive character. They furnish strong reasoning for the justification of limitations at first sight less welcome.

Business men have long been sharply limited in the use of the right of contract—a right peculiarly essential to their freedom. The most familiar and apposite instance is that of contracts in restraint of trade. Unenforceable at common law as against public policy because of their tendency to subject the public to undue prices, the Sherman Law made such contracts or combinations in the field of interstate commerce not merely illegal, but criminal. When this statute was first invoked the defendants urged that it violated their liberty as guaranteed by the Fifth Amendment. The Court held that the restraint while actual, was reasonably regarded as necessary for the protection of the public.⁵¹ When it became clear that great combinations of working men could subject the public to hardship as acute as that imposed by business combinations, it was urged that such combinations also fell within the legal prohibition of the Sherman Law. This law was indeed in the way of being effectively applied to labor combinations when by provisions in the Clayton Act they were exempted from it.⁵² Exemption of labor combinations may have resulted from a feeling that the right of combination, while merely beneficial to business men, was essential to workers to enable them to secure economic justice. If other means are provided for attaining that end, this distinction fails. In any event the logic of the anti-trust decisions

⁵⁰*Coppage v. Kansas* (1915) 236 U. S. 1, 35 Sup. Ct. 240, and cases cited.

⁵¹*United States v. Joint Traffic Ass'n* (1898) 171 U. S. 505, 19 Sup. Ct. 25; *Addyston Pipe & Steel Co. v. United States* (1899) 175 U. S. 211, 20 Sup. Ct. 96; *Northern Securities Co. v. United States* (1904) 193 U. S. 197, 24 Sup. Ct. 436.

⁵²*Loewe v. Lawlor*, *supra*, footnote 29; *Gompers v. Bucks Stove & Range Co.* (1911) 221 U. S. 418, 31 Sup. Ct. 492; *Eastern States Lumber Ass'n v. United States* (1914) 234 U. S. 600, 34 Sup. Ct. 951. The Clayton Act, 38 Stat. 730 (1914), forbidding the restraining of the recommending or advising of strikes, etc., would have to be superseded in part by the legislation here discussed, if it were to be effective. But as to the possible attitude of the courts toward the Clayton Act see *Bogni v. Perotti* (1916) 224 Mass. 152, 112 N. E. 853.

affords support for prohibiting interstate commerce employees, as well as their employers, from using to the public detriment the power of combination.

In American legal thinking of a generation ago the right of property stood side by side with the right of contract. Then came the development of the illuminating idea that property used for a purpose in which the public has a special interest, is itself affected "with a public use" and could hence be regulated so far as necessary for the protection of the public.⁵³ This doctrine may have been merely a partial revival of early principles of the common law, but the revival had far reaching effects.⁵⁴ It harnessed the powerful railway owner to the will of the public.

Today the chief dangers to the public in transportation are not from railway owners but from railway workers. Their great, well organized combinations have attained a strength that has made the men appear as unmindful of the public interest as did the corporation heads of the nineties. But the underlying principle of law which enables the public in its necessity to control the owners of railways is broad enough to make possible the control of the employees in their turn. If the property with which those employees do their work is affected with a public interest, so is their labor. The concern of the public is with the property only as it is used. It would be vain to say that the government may impose regulations upon those who furnish the property but none upon those who furnish the labor which makes that property a serviceable instrument to the public. Restraints upon the workers have not hitherto been tried because danger from that source was not apprehended, not because the law forbade them. The public service principle is as broad as the public need.⁵⁵

Any decision as to a limitation upon the right to strike will turn upon all the provisions and circumstances relating to that limitation. It will be of much consequence that this right, which may have hitherto been essential to enable the worker to secure proper terms of employment, is taken only in connection with

⁵³*Munn v. Illinois*, *supra*, footnote 34; *Brass v. Stoeser* (1894) 153 U. S. 391, 14 Sup. Ct. 857. The right to regulate common carriers was of course established long before, but the principle of law announced in *Munn v. Illinois* is an apt statement of the basis of such regulation.

⁵⁴Edward A. Adler, *Labor, Capital and Business at Common Law*, 29 *Harvard Law Rev.* 241.

⁵⁵See the valuable article of A. A. Bruce, *The Anthracite Coal Industry and the Business Affected with a Public Interest*, 7 *Michigan Law Rev.* 627.

the establishment of other means for securing such terms. If the prohibition of strikes is merely to permit public investigation of the dispute, the gain to the worker in informing the public of the justice of his case will be a compensation for his loss. If compulsory arbitration is established, such settlement like any judicial settlement must be presumed to do justice, irrespective of possible exertion of force by the parties. The law will not require any dissatisfied individual worker to remain at his task. In passing upon the Compulsory Workmen's Compensation Acts, the Courts justified the taking away of the worker's right to damages at law, but reached this result only in consideration of the establishment of different remedies deemed just to the worker and more beneficial to the public.⁵⁶

So approached, limitation of the right of railway employees to strike is but an instance of application of the fundamental judicial method of requiring individuals, for the vast benefit of social order, to forego what their strength might give them and accept what justice may decree. The proposed application is in the economic field, not in the strictly judicial, but it is necessitated by industrial development like the application of that principle to the railroads themselves. It is not too much to expect that railroad employees will come to realize this and give loyal trial to measures for saving the public from incalculable harm, without sacrificing the interests of the worker. If the Constitution were held not to permit such measures, it would be the first instance in which that instrument compelled the American people to remain helpless before disaster.

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⁵⁶New York Central R. R. *v.* White (1917) 37 Sup. Ct. 247.